# Section 106 agreements (s106)

Section 106 (S106) of the Town and Country Planning Act 1990 allows a local planning authority (LPA) to enter into a legally-binding agreement or planning obligation with a landowner in association with the granting of planning permission. The obligation is termed a Section 106 Agreement.

These agreements are a way of delivering or addressing matters that are necessary to make a development acceptable in planning terms. They are increasingly used to support the provision of services and infrastructure, such as highways, recreational facilities, education, health and affordable housing.

The scope of such agreements is laid out in the government's Circular 05/2005. Matters agreed as part of a S106 must be:

- relevant to planning
- necessary to make the proposed development acceptable in planning terms
- directly related to the proposed development
- fairly and reasonably related in scale and kind to the proposed development
- reasonable in all other respects.

A council's approach to securing benefits through the S106 process should be grounded in evidence-based policy.

However, the government viewed S106 as providing only partial and variable response to capturing funding contributions for infrastructure. As such, provision for the **Community Infrastructure Levy (CIL)** is now in place in the 2008 Planning Act. This will be done through a formula related to the scale and type of the proposal.

Current Government thinking is that S106 contributions will continue alongside CIL, but for a restricted number of purposes and requirements directly related to the site.

## An introduction to the community infrastructure levy

**What is the levy for?**

The levy will help pay for the infrastructure required to support new development. This includes development that does not require planning permission. The levy should not be used to remedy pre-existing deficiencies unless the new development makes the deficiency more severe.

The levy can be charged by local authorities in England and Wales – but they do not have to. Authorities that wish to charge a levy need to develop and adopt a CIL charging schedule.

Councils must spend income from the levy on infrastructure to support the development of the area but they can decide what infrastructure to spend it on and it can be different to that for which it was originally set.

**Calculating charges**

The levy will be charged per square metre net additional increase of floorspace on most buildings that people normally use. It is not just for housing.

The levy's rates should be based on evidence of the infrastructure needed. The charging authority can identify indicative infrastructure projects and the gap in the funding of these projects to calculate the aggregate funding gap the levy is intended to address. This should be balanced against viability. In reality, it is likely that viability will set the level. It is helpful to remember that the levy is not intended to be the main source of finance for infrastructure.

The levy is considered to be more transparent and straight forward than using planning obligations to fund infrastructure that supports the development of the area, especially large infrastructure projects. However, planning obligations may still have a role to play in terms of site specific infrastructure that mitigates the specific impacts of a development.

CIL payments will be indexed.

In setting a charging schedule there is a consultation requirement and the schedule will be independently examined. Councils will be required to correct charges that the examiner considers to be unreasonable.

Differential rates can be set based on uses (not necessarily use classes) and/or area.

The levy can be paid in kind (land and any existing buildings)

**Reliefs from paying the levy**

The regulations provide a limited number of types of relief from paying the levy, if they meet the conditions set out within the regulations:

1. A charity landowner must be granted exemption from paying the levy on their portion of the development to be used for charitable purposes.
2. A relief can be given by the charging authority in the case a charity exemption above if it would constitute state aid.
3. A charging authority can also choose to offer discretionary relief to a charity landowner where the greater part of the chargeable development will be held as a charitable investment, from which the profits are applied for charitable purposes.
4. 100% relief from paying the levy must be granted on those parts of a development which are intended to be used as social housing.

The regulation also allow authorities to offer relief from paying the levy in exceptional circumstances where a specific scheme cannot afford to pay it – but there are a number of strict conditions that must be met. Affordable housing cannot currently be funded through receipts from the levy. It should be provided through planning obligations.

**Collection, enforcement and monitoring**

Collecting authorities are in most cases the charging authorities.

These include:

- Districts
- Unitaries
- Metropolitan Councils
- London Boroughs
- London Mayor
- National park authorities and the Broads

Note that his does not include county councils. However, the county councils will collect on developments for which it gives consent. In London the boroughs will collect the levy for the Mayor. The Homes and Communities Agency (HCA), development corporations and enterprise zones can also collect if the relevant charging authority agrees.

Payments can be collected in instalments it is up to the authority to set a policy for this. Up to 5% of the total levy can be used to administer it.

There are extensive enforcement powers related to the levy including stop notices. An individual or organisation (for example the developer) may assume liability for payment of the levy. If no one assumes liability, the land owner is automatically liable for the charge.

Authorities will be required to monitor and report annually on the collection and spending of their levy.

**Using planning obligations**

Planning obligations (also known as section 106 agreements) can still legitimately be used for site specific mitigation measures. However, the regulations introduced a number of reforms to scale back the use of planning obligations.

Firstly, all planning obligations for development capable of being charged the levy must meet the three statutory tests:

1. Necessary to make the development acceptable in planning terms;
2. Directly related to the development; and
3. Fairly and reasonably related in scale and kind to the development.

Since April 2010 it has been unlawful for a planning obligation to be taken into account when determining a planning application for development capable of being charged the levy if the obligations does not meet all of these tests.

Secondly, authorities cannot double charge developers for the same item of infrastructure through the levy and planning obligations. The authority should set out what items it intends to fund through the levy on its website (Reg 123 list) otherwise it will not be able to fund any infrastructure thorough s 106 once the levy is adopted. Note: s278 of the Highways Act can be used in conjunction with CIL development on the Reg. 123 list.

Thirdly, on the local adoption of the levy or 6 April 2014 (whichever is sooner), contributions obtained through planning obligations can only be pooled from up to 5 development projects, or types of contributions (e.g. education) since April 2010, for infrastructure capable of being funded through the levy.

For items that are not capable of being funded by the levy, there are no restrictions on the number of obligations pooled.

Developments which are capable of being charged they levy include most buildings that people normally used. For the purpose of these tests, it does not matter if there is a local levy in operation or not. For developments that are not capable of being charged the one levy, the policy and policy tests in Circular 5/05 continue to apply.